BFW ATTORNEYS
BURNS FIGA & WILL

Scott A. Clark
sclark@bfwlaw.com

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Via Email: garcia.marissa@epa.gov

Marissa Garcia
Office of Regional Counsel
US EPA – Region 8

Re: Request for Hearing regarding Notice of Intent to Perfect a Lien; Pride of the West Mill Site, Town of Silverton, San Juan County, Colorado

Dear Ms. Garcia:

This firm represents Todd Hennis and Pride of the West, LLC ("POW") in matters regarding the Pride of the West Mill located on the property at 2201 County Road 2, Silverton, Colorado 81433 (the "Site"). POW is the owner of the Site as a result of being the sole bidder at a sheriff's sale of the property on July 23, 2015. POW received a notice letter dated April 6, 2022, from the EPA Region 8 Office alleging it may be a potentially responsible party for costs incurred as a result of EPA intervention on the Site between May and November 2021. The letter also notified POW of EPA's intent to perfect a federal lien on the Site pursuant to CERCLA §107(l)(3). This letter constitutes POW's objection to the perfection of a lien on the Site and its request for a conference with a neutral EPA official to contest the legal basis by which EPA asserts authority to perfect a lien upon its property.

For the following reasons, EPA lacks statutory authority to perfect a lien upon POW's property; (1) POW is not a potentially responsible party liable for removal costs as it is excluded from the definition of owner under 42 U.S.C. § 9601(20)(F); (2) POW was not provided notice of the removal action nor opportunity to perform any necessary removal action itself prior to the EPA's intervention as required by the National Contingency Plan at 40 C.F.R. § 300.415(a)(2); and (3) there was no release, threatened or otherwise, at the Site justifying EPA's intervention.

The EPA may perfect a lien upon the property in the amount for which "a person is liable to the United States under subsection [§107](a)." 42 U.S.C. § 9607(l)(1). To be a liable party under §107(a), a person must be the "owner and operator of a vessel or a facility." 42 U.S.C. § 9607(a). A lender that owns a facility as a result of a foreclosure is excluded from the §107(a) definition of an owner and operator if the lender diligently seeks to resell the property. "The term 'owner or operator' does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person . . . forecloses on the vessel or facility; and . . . seeks to sell, re-lease (in the case of a lease finance

transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements." 42 U.S.C. § 9601(20)(F)(ii).

POW owns the Site as a result of bidding to preserve its security interest at a San Juan County Sheriff's Sale executed pursuant to a Writ of Execution dated March 3, 2015. POW did not participate in the management or operations of the Site prior to taking title to the property. Since the foreclosure sale, POW has diligently sought to sell the Site in a commercially reasonable time. POW entered and has maintained a marketing agreement for the Site and has responded to numerous inquiries by prospective purchasers. Properties with the characteristics of the Site have a limited pool of potential buyers, resulting in difficulty finding a willing buyer. Therefore, a "reasonable time" for this particular property is many years. Because POW took title by foreclosure on a security interest, and has diligently marketed the site, POW is not an "owner and operator" of the Site as defined by §107(a) and is not a liable party upon whose property the EPA can perfect a lien under §107(l).

In addition, EPA may recover only its costs that are "not inconsistent" with the National Contingency Plan ("NCP"). 42 U.S.C. § 9607(4)(a). The NCP requires the EPA to make contact with potentially responsible parties and make an initial effort to determine whether the party "can and will perform the necessary removal action promptly and properly." 40 C.F.R. § 300.415(a)(2). "CERCLA precludes response actions by the EPA if a responsible party will take proper removal and remedial action." *United States v. Dickerson*, 660 F. Supp. 227, 233 (M.D. Ga.), *aff'd sub nom. Dickerson v. Adm'r, E.P.A.*, 834 F.2d 974 (11th Cir. 1987). Consistency with the NCP requires that EPA locate the owner of the property and assess the owner's ability to perform the removal action prior to intervening itself, and it precludes intervention if the owner "will take proper removal and remedial action." *J.V. Peters & Co. v. Adm'r, E.P.A.*, 767 F.2d 263, 266 (6th Cir. 1985).

POW is the record owner of the Site and has been since the sheriff's sale in 2015. Despite that fact, EPA made no attempt to contact POW or Todd Hennis prior to intervening at the Site and incurring removal costs. Instead of attempting to contact POW about the Site as required by the NCP, the EPA entered the Site and removed POW's property without notice. Such action is inconsistent with the NCP, and therefore the EPA may not recover costs incurred during its intervention. Thus, the EPA may not perfect a lien on the Site because the costs it incurred during its intervention at the Site are not consistent with the NCP.

EPA's authority to enter a facility for a removal action is based on the existence of a release or a threatened release of hazardous substances into the environment. 42 U.S.C. § 9604(e)(3). CERCLA defines a release to the environment as spilling, leaking, pumping, pouring, etc., to "the navigable waters, the waters of the contiguous zone, and the ocean waters . . . [and] any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States." 42 U.S.C. § 9601. CERCLA defines "release" as a hazardous substance that moves from a facility into the environment, not as a

release of a hazardous substance into a facility that is exposed to the environment. *See Fertilizer Inst. v. U.S. E.P.A.*, 935 F.2d 1303 (D.C. Cir. 1991).

The materials removed by the EPA from the Site were stored inside securely locked buildings and posed no threat of release to the environment. The entrances to all buildings on the Site were locked and secured, until the San Juan County Sheriff and personnel from the Colorado Division of Reclamation and Mining Safety ("DRMS") broke into the property and destroyed several of the locks in May 2021. All hazardous chemicals were contained within the buildings on the Site, and EPA documentation of the Site failed to identify a clear indication of a hazardous substance releasing from the facility into the environment. Therefore, there was neither a release nor a threatened release to the environment at the Site, and the EPA lacked authority under CERCLA to initiate a removal action.

For the foregoing reasons, EPA does not have a reasonable basis to assert a lien upon the Site under CERCLA §107(l), and we hereby request a conference with a neutral EPA official to make such a determination. Due to the historical relationship between POW, Todd Hennis, and EPA Region 8, we request a neutral EPA official be selected from a different EPA Region for the hearing. With this letter, we are providing supporting documentation, including an inventory of materials on the Site created by DRMS in May 2021, a Writ of Execution ordering a sheriff sale, the Sheriff's Certificate of Purchase demonstrating POW's ownership of the Site, and the marketing agreement and materials demonstrating POW has diligently pursued sale of the Site. POW reserves the right to provide additional documentation supporting its claim at the conference.

Please contact me with further questions regarding this matter.

Sincerely,

BURNS, FIGA & WILL, P.C.

Scott A. Clark

SAC/mjf
Enclosure

cc: Todd Hennis